Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JASON AGUILLARD,

Petitioner,

v.

JOSEPH K. McGOWEN AND HARRIS COUNTY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Issue 1

The 5th Circuit erred in reversing Judgment for Aguillard and rendering Judgment for Harris County because:

(a) the 5th Circuit expressly applied "the raised . . . evidentiary hurdle" announced in *Bryan County v. Brown*, 117 S. Ct. 1382 (1997) to this case where trial and Judgment occurred 4½ months before *Bryan County* was handed down;

(b) the 5th Circuit indulged in manifest injustice, inequity, and abuse of discretion in applying a 'new', higher standard to a case where trial and Judgment occurred under the 'old' standard;

(c) the 5th Circuit misinterpreted and misapplied Fed. R. Civ. P. 50, since the District Court correctly applied "the controlling law" at the time Judgment was entered;

(d) the evidence was legally adequate to meet the new *Bryan County* standard, given that the Harris County hiring procedure (applied without deviation in the case at bar) constituted a "deliberate indifference" to the rights of persons with whom its Deputy Sheriffs came into contact, so as to support liability under 42 U.S.C. § 1983.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 1

Considerations for Review 2

Statement of the Case 3

Argument 5

Conclusion 17

Prayer 18

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Allee v. Medrano, 416 U.S. 802 (1974) 2, 6, 17

Bryan County v. Brown, 117 S. Ct. 1382 (1997) 2, 3, 4, 5, 6, 8, 9, 14, 17

Bryan County v. Brown, 67 F.3d 1174 (5th Cir. 1997) 5

Celotex v. Catrett, 106 S. Ct. 2548 (1986) 2

Foreman v. Babcock, 117 F.3d 800 (5th Cir. 1997)..... 8

WMAC, Inc. v. Simon, 370 U.S. 190 (1962) 2, 6

RULES

Fed. R. Civ. P. 1 2

Fed. R. Civ. P. 50 ..... 5, 8

Sup. Ct. Rule 10.1(a)..... 2

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291..... 1

28 U.S.C. § 1343..... 3

42 U.S.C. § 1983..... 1, 3, 17

OPINIONS BELOW

The Judgment and Opinion of the 5th Circuit is reported at 207 F.3d 226 (5th Cir. 2000), a copy of which is included in the Appendix. The Judgment and Opinion of the District Court (Southern District of Texas/Houston Division) are not published, but are included in the Appendix.

STATEMENT OF JURISDICTION

Aguillard seeks review of the 5th Circuit Judgment and Opinion issued in this case on March 15, 2000. Aguillard timely filed his Motion for Rehearing, which was denied on April 20, 2000. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Motion for Rehearing. Thus, this Court has jurisdiction to review the 5th Circuit Judgment and Opinion per 28 U.S.C. § 1254(1); the 5th Circuit had jurisdiction to review the District Court's Final Judgment under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983 provides in pertinent part as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress . . . ".

CONSIDERATIONS FOR REVIEW

(Rule 10.1[a])

The 5th Circuit applied the "raised evidentiary . . . hurdle" announced in *Bryan County v. Brown,* 117 S. Ct. 1382 (1997) to this case where trial and Judgment occurred 4½ months before *Bryan County* was issued. Based on the new *Bryan County* standard, the 5th Circuit reversed and rendered Judgment for Harris County; at most it should have remanded for new trial under the new standard. Thus, the 5th Circuit decision conflicts *inter alia* with *Allee v. Medrano,* 416 U.S. 802, 820 (1974) ("District Court . . . did not have the benefit of our [recent] opinion . . . at the time of its decision; we therefore think it appropriate to . . . remand . . . ") and *WMAC, Inc. v. Simon,* 370 U.S. 190, 191 (1962). This same set of facts establishes that the 5th Circuit

> "So far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Sup. Ct. Rule 10.1(a). It is, moreover, manifestly unjust, inequitable and abuse of discretion to apply new requisites to a case tried before the new requisites were even issued. Fed. R. Civ. P. 1 ("just . . . determination of every action"); *Celotex v. Catrett,* 106 S. Ct. 2548, 2555 (1986) (same).

The 5th Circuit also misapplied *Bryan County,* since (as shown below) the evidence and inferences clearly

established Harris County's "deliberate indifference" under the new *Bryan County* standard. Thus, the 5th Circuit Judgment and Opinion is in conflict with and derogation of *Bryan County* itself.

STATEMENT OF THE CASE

This is a civil rights death case brought in District Court under 42 U.S.C. § 1983. On August 25, 1992, Susan White (Petitioner Aguillard's Mother) was murdered in the bedroom of her own home by Harris County deputy sheriff McGowen while he was in uniform, acting under color of State law and in the course and scope of his employment with Harris County. R.2 (859-71) Aguillard sued Harris County and Deputy McGowen in the Southern District of Texas/Houston Division, the District Court having jurisdiction per 28 U.S.C. § 1343. The Jury unanimously found in favor of Aguillard in September 1996 (Appendix). The District Court entered Judgment on the Verdict on December 13, 1996, amending same on January 31, 1997 (Appendix).

Later in 1997, this Court handed down *Bryan County v. Brown*, 117 S. Ct. 1382 (1997), a decision which expressly "raised the evidentiary hurdle" for cases dealing with County liability under § 1983. The 5th Circuit applied the new *Bryan County* standard to this case decided in the District Court under pre-*Bryan County* authority. *Appendix/5th Cir. Opinion*, p. 3 (*"Bryan County* [1997] . . . governs our inquiry . . . ").

The 5th Circuit reversed the District Court Judgment, holding the evidence insufficient to meet the new standard. Instead of remanding for new trial under the new standard, however, the 5th Circuit inexplicably rendered Judgment for Harris County. In doing so, it gave no explanation why Aguillard was not to be afforded even the proverbial 'shot' at meeting the new *Bryan County* standard. The 5th Circuit silence on the matter continued on Rehearing.

The 5th Circuit also erred in reversing and rendering Judgment for Harris County, since the evidence at bar met the new *Bryan County* standard. "Adequate scrutiny" of McGowen's background would have led a reasonable County policymaker to conclude that "the plainly obvious consequence" of hiring McGowen would be the deprivation of a 3d party's constitutional and civil rights. 117 S. Ct. at 1392. The trial record contained evidence from 3 different police agencies showing McGowen was not suitable to be a police officer, had numerous 'no rehire' notations, was considered dangerous, overly-aggressive and unpredictable, exhibited poor judgment and "crusader arrogance", and did not care about the correct way to handle police matters. S/F 649-60, 788-92, 889-97, 964-70, 1049-1105; R. 2016-23. Harris County itself recognized the risk to "public safety" created by the hiring of "individuals . . . with unstable personalities" and its "indispensable obligation to the public . . . to insure that (such) individuals . . . are not employed". *Px. 408* (Harris County Policy Manual). Harris County nevertheless conducted only a cursory investigation and hired McGowen anyway.

ARGUMENT

I. COURT SHOULD HAVE, AT MOST, REMANDED FOR TRIAL UNDER NEW STANDARD AND NOT RENDERED JUDGMENT OF DISMISSAL

Trial at bar was held in September 1996. A unanimous Jury Verdict was returned on Septcmber 25th, and (on December 13th) the District trial Court entered Judgment under the law controlling at that time, amending same in January 1997. *See, Bryan County v. Brown*, 67 F.3d 1174, 1184-5 (5th Cir. 1995) ("obvious need for a thorough and good investigation of [the Deputy] and . . . equally obvious fact that inadequate screening . . . could likely result in . . . violation of Constitutional rights. . . . "; "Sheriff . . . acted with deliberate indifference . . . when he hired [the Deputy]"; "failure to conduct a reasonable investigation . . . amounted to the Sheriff's deliberately closing his eyes to . . . [the Deputy's] background"; "such indifferent behavior cannot be tolerated").

About 4½ months ***after*** the Judgment was entered at bar, this Court issued a decision which expressly "raised the evidentiary hurdle" required to establish a County's deliberate indifference. 117 S. Ct. 1382 (1997).

Using the 'new' standard to review a case tried and a Judgment entered under the 'old' standard, the 5th Circuit decided to **render** Judgment for Harris County per Fed. R. Civ. P. 50. In this, the 5th Circuit erred.

Rule 50 requires a District Court to render Judgment "under the controlling law" at the time. There is no dispute that the District Court did so here. Where the law has changed during the interval between Judgment and

appeal – as here – equity calls for the case to be remanded for new trial under the new standard rather than rendition under the new standard. *See, Allee v. Medrano,* 416 U.S. 802, 820 (1974) ("District Court . . . did not have the benefit of our [recent] opinion . . . at the time of its decision [;] we therefore think it appropriate to . . . remand . . . "); *WMAC, Inc. v. Simon,* 370 U.S. 190, 191 (1962) (same).

This Court's *Bryan County* decision expressly "raised the **evidentiary** hurdle" required to show a County's deliberate indifference:

> "Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire . . . would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference'. . . . To test the link between (the) hiring decision and (the) injury, **we must ask whether a full review of . . . (applicant's) record reveals that (the) Sheriff . . . should have concluded that . . . (the applicant's) use of excessive force would be a plainly obvious[1] consequence of the hiring decision".**

117 S. Ct. at 1392.

Moreover, as between the new *Bryan County* decision and the case at bar, a key issue is different: Bryan involved "*deviation* from ordinary hiring practices" (*Id.* at

---

[1] This Court equated "plainly obvious" with "so obvious" and "so likely to occur". 117 S. Ct. at 1393.

1390) whereas at bar the background investigations on McGowen were in conformity with – and without deviation from – Harris County's policies, procedures and customs.[2] Detective Paige testified:

> "Q. Now, . . . in connection with the background investigation that you did on Mr. McGowen, . . . **you followed those (Harris County) policies and procedures to a 'T'?**
>
> A. Yes, sir. * * * (28 S/F 594-5).

The Regular's background investigator fully agreed: "Q. Can we be assured that when **you did the background investigation on Mr. McGowen, that you followed the policies, procedures, and customs . . . to a 'T'?** A. Yes." (29 S/F 817-18).

Given the change in the law after entry of Judgment at bar, the 5th Circuit should have, at most, remanded for new trial under the new standard.

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[2] The evidence here also established that the policies, customs and procedures, for background investigations – followed here by both the Reserves and Regulars – were identical. Detective Bush was instructed to accept the Reserve's background investigation on McGowen if the Reserve's policies and procedures were the same as the Regulars and, after checking into it: "Q. **Are their (the Reserves) standards and policies the same as your's (the Regulars)?**

A. Yes." (29 S/F 814-17).

II. SUBSTANTIAL EVIDENCE/INFERENCES SUPPORT VERDICT: RULE 50 RULING ERRONEOUS

Rule 50 required the 5th Circuit to apply "the **same** legal standard" as the District Court, both as to evidentiary sufficiency and the substantive elements of the particular claim being reviewed. *cf*: *Foreman v. Babcock*, 117 F.3d 800, 803 (5th Cir. 1997). It also required the 5th Circuit to "(1) consider all evidence . . . in the light most favorable to the non-movant, (2) drawing all factual inferences in favor of the non-moving party, and (3) **leaving . . . the drawing of legitimate inferences from the facts to the Jury**". *Id.* (numbering added). As shown below, the evidence and inferences were more than adequate to support

- the "risk" that McGowen's propensity to be dangerous and overly-aggressive would result in an excessive use of force against a citizen like Aguillard's Mother, *and*
- the "link" between the risk and the woefully inadequate Harris County policy that (per Harris County Detective Paige) it was possible for unstable people to be hired and cause "harm, damage and death" to others.

The 5th Circuit erred in its Rule 50 assessment and failed *inter alia* to leave the drawing of these reasonable inferences to the Jury.

The facts establishing McGowen's unsuitability here are **much more compelling** than those this Court faced in *Bryan County*. This Court has now mandated a "full review" of the applicant's background to determine if excessive force would be a "plainly obvious" consequence of the hiring decision. 117 S. Ct. at 1392. **Such a**

review here on the evidence presented below – and indulging all inferences and doubts in Aguillard's favor per Rule 50 – establishes the requisite direct "link" between McGowen's background and the civil rights violations Aguillard suffered. The contrast in the "plainly obvious" facts of the 2 cases is startling.

The *Bryan County* evidence was that, before being hired, the Deputy had **only** 1 campus bar fight *as a college student* that resulted in arrest and conviction for assault, along with 9 traffic violations, a DWI arrest and a suspended drivers license violation. Unlike at bar, none of the incidents involved conduct as a law enforcement officer, **and** none involved review by law enforcement professionals concerning suitability to be a police officer. Hence, the non-existent "link" between the *Bryan County* Deputy and the civil rights violation there at issue, along with the lack of "plainly obvious" evidence showing his unsuitability for law enforcement work.

A. Evidence of the McGowen "Risk" at Bar

Harris County's own policy recognized the "risk" posed by hiring officers of "unstable" personalities. *Px. 408*, § 11.5 ("indispensable obligation to the public . . . to *ensure* that individuals with . . . *unstable personalities* are not employed"; "candidates with unstable personalities *shall* be rejected . . . ").

Moreover, Aguillard presented substantial evidence of McGowen's unsuitability as a police officer spanning

over 5 years of his law enforcement career with 3 different police agencies, and the "plainly obvious risk" in hiring him, including *inter alia* that he

- **was not suitable to be a police officer,** ***and*** **had numerous 'no rehire' notations from other Police Departments;**
- was **dangerous** and **overly aggressive;**
- **exhibited poor judgment,** was **unpredictable** and was **not dependable;**
- **should have no contact with the public;**
- **exhibited "crusader arrogance";**
- **didn't care about the correct way to handle situations;**
- had **serious personality problems** that had the potential of exposing Tomball Police Department to unnecessary public scrutiny;
- was **prone to mood swings** and **quick to tune out common sense needed counseling;**
- **falsified an application for rehire concerning two disciplinary actions which had been sustained;**
- exhibited **immaturity** and **bad attitude** which were not compatible with acceptable job performance;
- was **not eligible for rehire** at Tomball Police department and **was asked to resign there.**[3]

Had Harris County an adequate policy, custom and procedure, it would have had all this data **before** it hired

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[3] *See*, e.g., S/F 649-60, 788-92, 889-97, 964-70, 1049-1105; Tr. 2016-23.

McGowen – all dealing directly and/or inferentially with his unsuitability and instability, as well as reflecting his propensity to be dangerous and overly-aggressive.

B. The 'Link'

Ironically, Harris County's Policy Manual itself confirmed the consequences of an inadequate background investigation:

> "Because the functions of the . . . Sheriff involve protection of life and property and enforcement of the law and because, fundamentally, all functions of the department are in the **interest of public . . . safety,** and because law enforcement officials . . . are endowed with authority far beyond that possessed by the ordinary civilian, the department has an **indispensable obligation to the public . . . to insure that individuals with . . . *UNSTABLE PERSONALITIES* are not employed * * * Candidates with . . . unstable personalities shall be rejected** where the facts ***as established by an investigation*** warrant such action."

Ex. 408 § 11.5.[4]

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[4] Plaintiffs' expert Don Byrd (former Dallas Police Chief, former Dallas County Sheriff and former Albuquerque Police Chief with 33 years of law enforcement experience) declared the Harris County policy inadequate because *inter alia* it failed to specify what should be done and by whom, left everything to the whim and discretion of the individual investigator without providing him or her with any policy guidance at all, and appeared to be merely an aspirational statement rather than a procedural policy. (S/F 1042-5, 1060).

Faced with that information, Detective Paige agreed that – **without adequate policies, customs and procedures – it was possible that unstable people could be hired and cause "harm, damage and death" to others.** He further confirmed that McGowen's letters of commendation did not speak to his suitability for being a police officer – a distinction that was critical:

> "Q. McGowen presented an impressive array of documents from friends, relatives and associates testifying to his good character and worth. **His good character and worth, however, are not at issue.** ***What is at issue is McGowen's suitability to be a police officer for this department. A significant majority of Mr. McGowen's supervisors and co-workers have gone on record saying he is not*****: Based on all I know, I recommend the initial decision stand. I still believe McGowen's request of reinstatement should be denied".**
>
> **The distinction . . . made between the letters and whether or not (McGowen) . . . is really suitable for employment is a very important distinction, isn't it?**
>
> A. **Yes.**
>
> Q. **You recognize that distinction and you accept that distinction, don't you?**
>
> A. **Yes.**
>
> Q. **When you . . . were discussing . . . the category of an impressive array of documents from friends, relatives and associates, that . . . is only a small part of a proper analysis that *should* have been made . . . , isn't that true?**

A. Yes.

Q. Because . . . **you must go further and determine whether or not McGowen is suitable to be a police officer for the department; isn't that true?**

A. Yes.

Q. AND **THE BREAKDOWN HERE . . . IS THAT YOUR POLICY, THE PROCEDURE AND THE CUSTOM THAT YOU WERE OPERATING UNDER *DID NOT REQUIRE YOU TO GO* FURTHER TO FIND THAT, DID IT?**

A. No.

Q. If that policy had required you to go further, you would have followed . . . it to a T?

A. Yes.

Q. And if . . . (the policy) required you to go further to determine the suitability of Mr. McGowen, . . . **IN ALL PROBABILITY YOU WOULD HAVE DISCOVERED THE INFORMATION THAT WE KNEW WAS IN EXISTENCE OR THAT WE KNOW IS IN EXISTENCE BACK THEN?**

A. YES.

Q. AND IF YOU HAD DISCOVERED THAT, IF THE POLICY HAD REQUIRED THAT OF YOU, . . . YOU WOULD NOT HAVE GIVEN HIM A FAVORABLE RECOMMENDATION.

A. THAT'S CORRECT.

> Q. **And in all probability, McGowen would not have even made it up to a level where it would have even had to have been decided on whether or not he would be hired? * * ***
>
> A. **Probably. * * ***
>
> Q. **HE WOULD NOT HAVE BEEN CARRYING A HARRIS COUNTY SHERIFF'S DEPARTMENT BADGE, TOTING A HARRIS COUNTY GUN, AND WALKING IN HER HOUSE THAT NIGHT, WOULD HE?**
>
> A. ***PROBABLY NOT.*** (S/F 773-76)

Based on the evidence, Aguillard's expert Byrd confirmed the requisite link, that Harris County policies, procedures and customs led to Susan White's death – **and** if they had been adequate, Susan White would be alive today! (S/F 1049-1105).

This evidence and reasonable inferences therefrom are more than adequate to support the Verdict and Judgment against Harris County under the new *Bryan County* standard. In holding otherwise, the 5th Circuit erred, misapplied both the Rule 50 strictures and this Court's *Bryan County* decision, and usurped the Jury's function.

C. Harris County's Inadequate Policy

Harris County's policy was clearly inadequate. The evidence here established a clear "risk" and "link" that was "plainly obvious" as between McGowen's background and the egregious civil rights violation visited upon Aguillard. If Harris County had bothered to look, it

would have discovered all of the unsavory details about McGowen, and his clear unsuitability for hire – after all, this Court mandates "adequate scrutiny". 117 S. Ct. at 1392. The Harris County policy, custom and procedure, however, was woefully defective and inadequate – even though followed to a "T", it allowed McGowen to be hired. Examples of the inadequacies of the Harris County policy, custom and procedure abound. It

- did not require determination of why McGowen wasn't rehired or even eligible for re-hire at other Police agencies where he had worked (S/F 767);
- did not require the investigator to determine whether there were any discrepancies between an applicant's questionnaire, his application and documents attached (S/F 621-22);
- required the investigator only to contact a minimiun of 5 people but did not tell him who to contact (S/F 623);
- did not require the investigator to contact an applicant's supervisors at a previous employment (S/F 623);
- or the Employment Services Divisions of previous Police Department employers (S/F 645);
- did not require the investigator to contact every other employer (S/F 623);
- left to the investigator's discretion who to contact (S/F 623-624);
- did not require contact with "short term" employers, even though they admittedly

may have information concerning an applicant's questionable conduct and instabilities (S/F 624);

- only required the investigator to contact persons on an applicant's reference list (S/F 629);

- did not require the investigator to record the names or data received from any person contacted, *and* did not mandate contact with McGowen's previous supervisors or partners (S/F 630-31);

- did not require the investigator to check supervisory critiques of employers who had previously terminated the applicant (S/F 632, 680);

- or grievance records (R. 632), or appeals board records (S/F 633);

- when an applicant admitted denial of employment at another job, the investigator need only look at personnel records given to him by that employer and if nothing was found, the search was over (S/F 633-34) – even where an applicant like McGowen signs a release for Houston Police Department to provide all records including confidential and privileged records; did not require unfavorable references to be checked out (S/F 645);

- did not require resolution of inconsistency between the records allegedly seen in McGowen's file that he was "eligible for rehire" when **McGowen confirmed that he was *not* eligible for rehire** (S/F 681).

Harris County did not even require the investigator to determine if an applicant like McGowen was even "suitable to be a police officer for the department"! (S/F 44). This evidence and reasonable inferences therefrom is adequate to support the Verdict and Judgment against Harris County.

CONCLUSION

The 5th Circuit erred in applying a new standard (*Bryan County)* to a Jury Verdict and Judgment entered prior to the adoption of the new standard. In doing so, it committed manifest injustice, inequity, and abuse of discretion, as well as raising a conflict with this Court's earlier decisions in, *inter alia, Allee.* At most, the 5th Circuit should have remanded the case for new trial against Harris County under the new standard. Moreover, the evidence was sufficient to support the Jury findings and Judgment entered thereon that the Harris County policies, procedures and customs – followed without deviation at bar – were constitutionally inadequate. Given Deputy McGowen's previous unsavory history as a law enforcement officer, it was a plainly obvious consequence of the Harris County decision to hire him that citizens such as Aguillard and his Mother would be deprived of their federally-protected rights and privileges. The Harris County policies, procedures and customs constituted deliberate indifference to the rights of persons with whom its deputies came into contact, supporting liability under § 1983. The 5th Circuit erred when

it reversed and rendered Judgment in favor of Harris County, dismissing it from this suit.

Petitioner Aguillard respectfully prays the Court to issue Writ of Certiorari to review the Judgment and Opinion of the 5th Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20039

JASON AGUILLARD; ET AL.,

Plaintiffs,

JASON AGUILLARD; O.L. HARRISON; WILLIAM A. HARRISON; SANDRA HARRISON; GLORIA HAMILTON,

Plaintiffs-Appellees,

v.

JOSEPH K. MCGOWEN; ET AL.,

Defendants,

JOSPEH K. MCGOWEN; HARRIS COUNTY, TEXAS,

Defendants-Appellants.

O. L. HARRISON, Surviving Parent of Susan Harrison White, Deceased; WILLIAM A. HARRISON, Surviving Parent of Susan Harrison White, Deceased; GLORIA HAMILTON, Individually and as next friend of Jason Aguillard; SANDRA HARRISON, Individually and on behalf of Estate of Susan Harrison White, Deceased,

Plaintiffs-Appellees,

v.

JOSEPH K. MCGOWEN; ET AL.,

Defendants,

JOSPEH K. MCGOWEN; HARRIS COUNTY, TEXAS,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas

March 15, 2000

Before BARKSDALE, BENAVIDES and DENNIS, Circuit Judges.

BENAVIDES, Circuit Judge:

Appellants Joseph K. McGowen ("McGowen") and Harris County, Texas ("the County") appeal from a jury verdict holding them liable for the wrongful death of Susan Harrison White ("White") pursuant to 42 U.S.C. § 1983. The district court, giving preclusive effect to McGowen's Texas state criminal conviction for murder, forbade McGowen to present evidence on the issue of excessive force. Because the state court of appeals reversed McGowen's criminal conviction on appeal, we vacate and remand for a new trial on the merits. We further determine, pursuant to our sufficiency of the evidence analysis, that insufficient evidence supports the County's liability, and we therefore reverse and dismiss the County from the suit. Finally, we hold that White's sisters, appellees Sandra Harrison ("Harrison") and Gloria Hamilton ("Hamilton") lack standing in their individual capacities, and we thus dismiss them from the suit as individual plaintiffs.

I. Factual and Procedural Background

McGowen began working as a deputy for the Harris County Sheriff's Department on October 4, 1990. Sometime thereafter, the Sheriff's Department assigned him to patrol the Olde Oakes subdivision, where White, and her son, appellee Jason Aguillard ("Aguillard"), lived. Though the details are unclear, McGowen engaged in conduct during his patrol that White characterized as sexual harassment.

To assess her options in dealing with McGowen, White and a friend, Ray Valentine ("Valentine"), had dinner with another Harris County Deputy Sheriff, Captain C.J. Harper ("Harper"). Harper claims that he advised her that she could complain to the Sheriff's office; if that yielded no results, she could resort to the Internal Affairs Division, the District Attorney or the FBI. White did not register any formal complaint about McGowen.

Several months later, on August 22, 1992, White and Valentine were having dinner at a restaurant when a friend of Aguillard's approached White and told her that McGowen was arresting Aguillard. White and Valentine immediately went to the site of the arrest and attempted to dissuade McGowen from arresting Aguillard. When their pleas fell on deaf ears, White yelled, "I'm going to get you, [McGowen,] you son of a bitch."

McGowen had arrested Aguillard for possession of a stolen credit card and selling a stolen gun to an undercover officer. Instrumental in Aguillard's capture was Michael Schaeffer ("Schaeffer"), a childhood friend of Aguillard's, who apparently agreed to inform on

Aguillard after McGowen pulled him over multiple times for traffic violations. McGowen had also arrested Schaeffer, but released him immediately.

Knowing of Schaeffer's arrest and prompt release, White called both Schaeffer's aunt and mother, inquiring about his whereabouts. White told Schaeffer's aunt, "I think Michael is an informant and in Houston an informant is a dead person." White repeated a similar statement to Schaeffer's mother. Though neither Schaeffer nor his mother took these statements seriously, Schaeffer reported them to McGowen, who replied that White was a "threat" and "needed" to go to jail.

Embellishing White's statements to the point of fabrication, McGowen obtained a warrant to arrest White for felony retaliation. McGowen set out to execute this warrant on August 24, 1992, at around midnight. McGowen and two other deputies woke White, who refused to open her front door. While McGowen sought permission to enter the house forcibly, White called 911. Having obtained the necessary approval, McGowen and the other deputies broke down the back door. McGowen ran into White's bedroom, where, he claims, she was sitting on the bed, pointing a gun at him. McGowen shot her three times, killing her.

McGowen was tried and convicted of murder; the trial court sentenced him to 15 years imprisonment.

Aguillard, White's parents, Hamilton and Harrison (individually and as next friend of Aguillard and White's estate respectively) brought a wrongful death action on March 9, 1993. During the trial, held from September 11-25, 1996, the district court *sua sponte* raised the issue of

collateral estoppel, concluding that McGowen's criminal conviction was a final judgment which precluded McGowen from relitigating the issue of excessive force. The jury returned a verdict in favor of Aguillard in an amount exceeding $4 million.

McGowen and the County timely filed their appeal.

II. Standards of Review

We review a district court's decision to apply collateral estoppel for an abuse of discretion. *See Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 391 (5th Cir. 1998).

We apply *de novo* review to a district court's denial of a motion for judgment as a matter of law. *See Rutherford v. Harris County, Texas*, 197 F.3d 173, 178 (5th Cir. 1999). "In ruling on a rule 50 motion based upon sufficiency of the evidence, we 'consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion.' " *Information Communication Corp. v. Unisys Corp.*, 181 F.3d 629, 633 (5th Cir. 1999) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)). The district court properly grants a Rule 50 motion for judgment as a matter of law only where the facts and inferences indicate a particular outcome so strenuously that reasonable minds could not disagree. *See Rutherford*, 197 F.3d at 179.

III. Collateral Estoppel

McGowen and the County argue that, because the 14th Court of Appeals, the state court reviewing McGowen's murder conviction, reversed it, the conviction is not a "final judgment" sufficient to exert a preclusive effect. Therefore, they claim, the district court denied McGowen a fair trial by barring his defense, and they urge us therefore to vacate and remand.

Aguillard retorts that the 14th Court of Appeals reversed McGowen's conviction for procedural reasons and specifically found that the evidence supported the verdict. A verdict reversed on a "technicality" for which sufficient evidence exists, Aguillard argues, should retain its preclusive impact.

We do not agree with Aguillard's argument that the verdict in the criminal case retains its preclusive effect. The 14th Court of Appeals undeniably reversed McGowen's conviction,[1] which unquestionably constituted the final judgment on which the lower court based its determination of collateral estoppel. A conviction overturned on appeal cannot constitute a final judgment for purposes of collateral estoppel. *See J.J. Gregory Gourmet*

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[1] The 14th Court of Appeals twice reversed McGowen's conviction. The first reversal occurred on April 10, 1997. The Texas Court of Criminal Appeals, however, vacated that judgment on October 28, 1998 and remanded to the 14th Court of Appeals, which again reversed McGowen's conviction on February 3, 2000.

It is anticipated that the State of Texas will seek discretionary review of the 14th Court of Appeals's decision with the Texas Court of Criminal Appeals.

Servs., Inc. v. Antone's Import Co., 927 S.W.2d 31, 34 (Tex.App. – Houston 1995, no writ) ("[W]hen the appellate court reverses [a] judgment, the finality necessary for claim or issue preclusion is eliminated."); *Lulirama Ltd., Inc. v. Axcess Broadcast Servs., Inc.*, 128 F.3d 872, 876 n. 2 (5th Cir. 1997).[2]

Aguillard's argument that a reversed conviction still exerts a preclusive effect is simply incorrect, based, as it is, on a misreading of *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986), which holds only that a judgment retains its preclusive impact while on appeal. *See id.* ("[W]e . . . hold that a judgment is final for purposes of issue and claim preclusion 'despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo.' " (quoting Restatement (Second) of Judgments § 13 cmt. f)). *Scurlock* does not involve a situation in which the judgment given preclusive effect has been reversed on appeal, as does the present circumstance.

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[2] Even if the State were now to appeal the February 3, 2000 reversal of McGowen's conviction, during the pendency of the appeal, the reversed conviction cannot exert preclusive effect. *See Lulirama*, 128 F.3d at 876 n. 2 ("The fact that an appeal is pending in a higher appellate court does not restore the preclusive effects of the reversed judgment.") (quoting 18 Charles Alan Wright, et al., Federal Practice and Procedure § 4432, 302 (1981)).

For this reason, on February 4, 1998, the date on which the panel heard oral argument in this matter, McGowen's conviction exerted no preclusive effect – despite the pendency of its appeal before the Texas Court of Criminal Appeals – because the 14th Court of Appeals had already reversed it.

Indeed, Scurlock even states that "[a] judgment in a second case based on the preclusive effects of a prior judgment should not stand if the judgment is reversed." *Id.* We thus hold that Aguillard's arguments in favor of granting preclusive effect to McGowen's criminal conviction for murder are wholly without merit.

Because the practical import of the lower court's application of collateral estoppel was to deny McGowen the opportunity to present a defense to the complaint, we see no viable course of action but to vacate and remand for a new trial on the merits. Without a valid determination of the excessive force claim, neither the judgment against McGowen nor the County can be sustained.

IV. Sufficiency of the Evidence

The County argues that the evidence is not sufficient to support a finding that it was deliberately indifferent to White's right to be free from excessive force when it hired McGowen without discovering confidential information located in his file with the Houston Police Department, or without following up on the leads suggested by his polygraph test.

Aguillard naturally insists that the evidence is to the contrary.

Board of County Comm'rs of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997) governs our inquiry into the sufficiency of the evidence. "Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the [hiring] decision . . . would be the

deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.' " *Id.* at 411. Any finding of culpability "must depend on a finding that this officer was likely to inflict the particular injury suffered by the plaintiff. The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong." *Id.* at 412.

The specific facts involved in *Bryan County* are extremely instructive. There, Reserve Deputy Stacy Burns ("Burns") stood convicted of using excessive force when he wrested a woman from a car, badly damaging her knees in the process. Burns, who was the great-nephew of Sheriff Moore, Bryan County's Sheriff and policymaker, had a criminal record that included arrests for driving while intoxicated, driving with a suspended license, resisting arrest, public drunkenness, and a conviction for assault and battery. Looking at this record, the Supreme Court held that Sheriff Moore's failure to examine Burns's criminal record did not "reflect[ ] a conscious disregard for a high risk that Burns would use excessive force in violation of respondent's federally protected right." *Id.* at 415-16.

Here, the record is far less suggestive of McGowen committing homicide than the record in *Bryan County* was of Burns committing battery. The record shows that McGowen threatened the mother of a juvenile with arrest, that he meddled in this mother's supervision of the child while he was off duty, and that the mother ultimately hired an attorney and threatened to obtain a restraining order against him. Colleagues at the Houston Police

Department reported that McGowen wanted to "ride where the women were," and a female colleague stated that she did not want to ride with him under any circumstances. The record also discloses a report that in March 1990, McGowen assaulted and pistol-whipped a teenage boy who was driving his car around McGowen's apartment complex. Significantly, McGowen was neither arrested for nor convicted of the alleged assault. But while all of this may indicate that McGowen was "an extremely poor candidate" for the County's police force, *id.* at 414, the record shows not one shred of solid evidence foreshadowing McGowen's tragic killing of White. McGowen had never been formally disciplined, and his informal discipline record included only the infractions of using the police radio for broadcasting personal messages and refusing to convey information to one party in a vehicular accident. McGowen had never wrongfully shot anyone before, nor did his record reveal him to be likely to use excessive force in general or possess a trigger-happy nature in particular. Certainly, the evidence of deliberate indifference in this case falls short of the quantum and quality of evidence presented in *Bryan County*, which the Supreme Court determined to be insufficient. In short, even when viewing the evidence, as we must, in the light most favorable to Aguillard, the record is bereft of evidence sufficient to impose liability on the County for wrongfully hiring McGowen. While the County may have been negligent in its employment decision, the magnitude of its error does not reach constitutional cognizance. We therefore hold that the district court erred in denying the County's Rule 50 motion for judgment as a matter of law, and we dismiss the County from this case.

V. Remaining Issues

Because our rulings on the collateral estoppel and Rule 50 issues constrain us to vacate and remand and dismiss the County, we need not address all of the remaining issues the parties raise, save with respect to the following: the question of whether White's sisters have standing in their individual capacities to bring a wrongful death suit.

McGowen and the County assert that White's sisters, Harrison and Hamilton, lack standing to bring this suit. Harrison and Hamilton respond by asking this court to acknowledge their right to bring this suit.

Pursuant to 42 U.S.C. § 1988, we must look to the state wrongful death statute to determine who has standing to bring a wrongful death claim under § 1983. The Texas Wrongful Death and Survival Statutes, Tex. Civ. Prac. & Rem. Code §§ 71.004 and 71.021, set forth the parties who can bring suit. The Estate of Susan White ("the Estate") has standing pursuant to the Survival Statute, § 71.021, and Harrison, as White's heir and the legal representative of the Estate, has standing to prosecute the action. *See Garcia v. Caremark, Inc.*, 921 S.W.2d 417, 421 (Tex.App. – Corpus Christi 1996, reh'g overruled); *Handley v. City of Seagoville, Texas*, 798 F.Supp. 1267, 1270 (N.D.Tex. 1992). Moreover, Hamilton, as an heir and interested party in the suit, may act as next friend for Aguillard. *See International & G.N. Ry. Co. v. Kuehn*, 8 S.W. 484, 485-86 (Tex. 1888).

Thus, the controversy focuses on whether Harrison and Hamilton have standing in their individual capacities. Neither Harrison nor Hamilton can cite any law from

this Circuit supporting their bid for standing. As siblings are, based on the plain language of the statutes, plainly not within the scope of the Texas Wrongful Death and Survivor Statutes, we decline to permit Harrison and Hamilton to bring this action in their individual capacities. Upon retrial, then, Harrison and Hamilton must be dismissed as individual parties.

VI. Conclusion

We hold that a conviction reversed on appeal cannot function as a final judgment supporting the application of collateral estoppel. We therefore vacate and remand for a full trial on the merits.

We further hold that the evidence is insufficient to impose liability upon the County, and that the district court erred in refusing the County's motion for judgment as a matter of law. We therefore reverse and dismiss the County from the suit.

Finally, we hold that Harrison and Hamilton lack standing in their individual capacities. The district court erred in denying the County's motion to dismiss them as individual parties, and we therefore dismiss them from the suit in their individual capacities.

VACATED, REVERSED and REMANDED.

[Seal]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JASON AGUILLARD AND RONALD F. WHITE Plaintiffs, vs. JOSEPH K. MCGOWEN, ET AL., Defendants.	§ § § § § § § §	CIVIL ACTION NO. H-93-4110

COURT'S CHARGE

(Filed Sept. 25, 1996)

This charge is presented to the jury this 25th day of September, 1996.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

GENERAL INSTRUCTIONS

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but

must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. A governmental entity is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consisted of the sworn testimony of the

witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them.

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence – such as the testimony of an eyewitness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

The means of knowledge are ordinarily the equivalent in law to knowledge. So, if it appears from the evidence in the case that a person had information which would lead a reasonably prudent person to make inquiry through which he would surely learn certain facts, then this person may be found to have had actual knowledge of those facts, the same as if he made such inquiry and had actually learned such facts.

That is to say, the law will charge a person with notice and knowledge of whatever he would have learned, upon making such inquiry as it would have been reasonable to expect him to make under the circumstances. Knowledge or notice may also be established by circumstantial evidence.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

The testimony of a police officer should be considered by you just as any other evidence in this case, and in evaluating this credibility you should use the same guidelines which you apply to the testimony of any witness. In no event should you give either greater or lesser credence to the testimony of any witness merely because he is or was a police officer.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has

testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that

the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

DUTY TO DELIBERATE

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your

fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the Plaintiffs from a preponderance of the evidence in the case in accordance with the other instructions.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesman here in Court.

Interrogatories have been prepared for your convenience.

You will take these instructions and interrogatories to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form which sets forth the verdict upon which you unanimously agree; and then return your verdict to the courtroom.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means

other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open Court.

Bear in mind also that you are never to reveal to any person – not even the Court – how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree: Your verdict must be unanimous.

SPECIFIC INSTRUCTIONS

The Plaintiffs in this action claim that the individual Defendant, Joseph K. McGowen, violated Susan White's constitutional rights prohibiting the use of excessive and unnecessary force in arresting her, that resulted in her death. In addition to these claims against the individual Defendant, McGowen, the Plaintiffs are suing Harris County through the Harris County Sheriff's Department, McGowen's employer. As a result of the Defendants' actions and Susan White's death, the Plaintiffs claim that they suffered injuries for which they seek damages. The Defendants deny any violation of Susan White's constitutional rights and say they are not guilty of any fault or wrongdoing.

Under the Constitution of the United States, a citizen has both the right to liberty and the right to not be

arrested without due process of the law – rights guaranteed by the Fourth, Fifth, Eighth and Fourteenth Amendments. These rights also carry with them the right not to be subjected to unreasonable force while being arrested by a law enforcement officer. The Constitution also outlaws the use of a policy, custom, ordinance, regulation or decision that deprives a citizen of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States.

Section 1983 of Title 42 of the United States Code provides that any citizen may seek redress in this Court by way of damages against any governmental entity which through "deliberate indifference" or any person who, under color of state law or custom intentionally deprives that citizen of any rights, privileges or immunities secured or protected by the constitution or laws of the United States.

INSTRUCTIONS AS TO MCGOWEN

In order to prove their claim under this statute against deputy McGowen, the Plaintiffs must establish by a preponderance of the evidence each of the following elements:

(1) that deputy McGowen intentionally committed acts which operated to deprive the Decedent Susan White of a right secured by the Constitution of the United States;

(2) that deputy McGowen acted under color of the authority of the State of Texas;

(3) that deputy McGowen's acts were the legal cause of the Plaintiffs' damages.

In this case you are instructed that the deputy McGowen was acting under "color of state law" at the time of the acts complained of and that he used excessive force in attempting to arrest Susan White.

The Court also instructs you that the conduct of deputy McGowen was a "cause-in-fact" of the injury to Susan White and that it played a substantial part in the injury suffered by Susan White and therefore was a "proximate cause" of the damages suffered by the plaintiff. Finally, the Court instructs you that deputy McGowen acted maliciously and willfully and with callous and reckless indifference to the rights and safety of Susan White.

Therefore, as it relates to deputy McGowen, liability has been determined by the Court and you should consider only what damages, if any, the plaintiffs suffered at the hands of deputy McGowen.

INSTRUCTIONS AS TO HARRIS COUNTY

The Plaintiffs also claim that Harris County, through the Harris County Sheriff's Department, is liable for the alleged constitutional deprivation. Harris County is liable for the deprivation of a constitutional right if the deprivation resulted from the implementation of a policy or custom of Harris County.

The Plaintiffs claim that Harris County maintained policies and customs that deprived the decedent, Susan White and the plaintiffs of their constitutional rights in connection with: (a) its policies and customs concerning background investigation; (b) its policies and customs

concerning training; (c) its policies and customs concerning supervision; and (d) its policies and customs concerning advising supervision of complaints by the public against its deputies.

Harris County can be found liable under Section 1983 only for a deprivation of a federally protected constitutional or statutory right that is inflicted pursuant to "official policy or custom." Thus, to prevail against Harris County, the Plaintiffs must prove, by a preponderance of the evidence, that:

(1) an official policy or custom;

(2) of a policy maker for Harris County;

(3) was a legal cause permitting Susan White to be subjected to a deprivation of a constitutional right.

Absent such findings, Harris County cannot be held liable under Section 1983 for an injury inflicted solely by its employees or agents. Therefore, proof of mere negligence on the part of county officials is not sufficient.

Harris County can be held liable only if it is shown that Harris County acted with "deliberate indifference" to the constitutional rights of Susan White by virtue of its policies, customs or procedures. In the context of this case, the term "deliberate indifference" refers to the adoption of, or failure to adopt, "policies" which adoption or failure creates an obvious substantial risk to Susan White. While the county policy maker's failure to adopt a precaution can be the basis for liability, such omission must amount to an intentional choice, not merely an unintentionally negligent oversight. A failure to adopt a policy does not constitute such an intentional choice

unless it can be said to have been "deliberately indifferent." A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights.

An "official policy" is defined as: A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the county's lawmaking officers or by an official to whom the lawmakers have delegated policy making authority.

A "custom" is defined as: A persistent widespread practice or procedure of county officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents county policy. Actual or constructive knowledge of such custom must be attributable to the Commissioners Court, which is the governing body of the county, or to the Harris County Sheriff, who is the policy making authority for deputy sheriffs. An isolated incident is insufficient to prove the existence of a custom or usage.

Therefore, if you find that Susan White was injured as a proximate or legal result of any asserted violation of a policy, custom or procedure, whether made by its lawmakers or by those officials whose acts may fairly be said to represent official policy, Harris County itself will be responsible.

An act or omission is a proximate cause of the Plaintiffs' injuries or damages if it appears from the evidence that the injury or damage was a reasonably foreseeable

consequence of the act or omission. Now answer the following interrogatories:

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JASON AGUILLARD, ET AL	§	
	§	
Plaintiffs,	§	CIVIL ACTION NO.
	§	H-93-4110
vs.	§	
JOSEPH K. MCGOWEN, ET AL	§	
	§	
Defendants.	§	

AMENDED FINAL JUDGMENT

(Filed Jan. 31, 1997)

Pursuant to the jury verdict and the rulings of the Court, the plaintiffs shall have judgment against the defendants jointly and severally as follows:

A. 1.	Jason Aguillard	$1,500,000.00
2.	O. L. Harrison	900,000.00
3.	William Harrison	900,000.00
4.	Gloria Hamilton	200,000.00
5.	Sandra Harrison	300,000.00
6.	Estate of Susan White	520,000.00

B. As a punitive damage award, and in addition to the damages awarded in section "A", the plaintiffs' shall have judgment against Joseph K. McGowen, individually as follows:

1.	Jason Aguillard	$500,000.00
2.	O. L. Harrison	100,000.00
3.	William Harrison	100,000.00
4.	Gloria Hamilton	100,000.00
5.	Sandra Harrison and Estate of Susan White	200,000.00
C.	An Attorney's Fee	$193,750.00
D.	Costs of Court and Out-of-Pocket Expenses	$ 26,949.62

This is a Final Judgment.

Signed this 31st day of January, 1997.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20039

JASON AGUILLARD; ET AL

Plaintiffs

JASON AGUILLARD; O L HARRISON; WILLIAM A. HARRISON; SANDRA HARRISON; GLORIA HAMILTON

Plaintiffs – Appellees

v.

JOSEPH K MCGOWEN; ET AL

Defendants

JOSEPH K MCGOWEN; HARRIS COUNTY TEXAS

Defendants – Appellants

****

O L HARRISON, Surviving Parent of Susan Harrison White Deceased; WILLIAM A HARRISON, Surviving Parent of Susan Harrison White Deceased; GLORIA HAMILTON, Individually and as next friend of Jason Aguilar; SANDRA HARRISON, Individually and on behalf of Estate of Susan Harrison White Deceased

Plaintiffs – Appellees

v.

JOSEPH K MCGOWEN; ET AL

Defendants

JOSEPH K MCGOWEN; HARRIS COUNTY TEXAS

Defendants – Appellants

Appeals from the United States District Court for the Southern District of Texas, Houston

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ON PETITIONS FOR REHEARING

(Filed April 20, 2000)

Before BARKSDALE, BENAVIDES and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above case are DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

REHG-13

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that Harris County, in the exercise of its policy or custom, acted with "deliberate indifference" to the constitutional rights of Susan White and the plaintiffs?

Answer "we do" or "we do not".

Answer: WE DO.

INTERROGATORY NO. 2

Was any such violation of Susan White's and the plaintiffs' constitutional rights, by Harris County if you have so found in response to Interrogatory No. 1 a proximate cause of Susan White's death and the injuries suffered by the plaintiffs?

Answer "we do" or "we do not".

Answer: WE DO.

INSTRUCTIONS ON DAMAGES

If the Plaintiffs have proven their claims against the Defendants by a preponderance of the evidence, you must determine the damages to which the Plaintiffs are entitled. You should not interpret the fact that I have given instructions about the Plaintiffs' damages as an indication in any way that I believe that the Plaintiffs should, or should not, win this case. It is your task first to decide whether the Defendants are liable. I am instructing you on damages only so that you will have guidance in the event you decide that the Defendants are liable and

that the Plaintiffs are entitled to recover money from the Defendants.

If you find that the Defendants are liable to the Plaintiffs, then you must determine an amount that is fair compensation for all of the Plaintiffs' damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the Plaintiffs whole – that is, to compensate the Plaintiffs for the damages that the Plaintiffs have suffered. Compensatory damages are not limited to expenses that the Plaintiffs may have incurred because of Susan White's death. If the Plaintiffs win, they are entitled to compensatory damages for the physical injury, pain and suffering, mental anguish, shock and discomfort that they suffered because of the Defendants' conduct.

You may award compensatory damages only for injuries that the Plaintiffs prove were proximately caused by the Defendants' allegedly wrongful conduct. The damages that you award must be fair compensation for all of the Plaintiffs' damages, no more no less. You should not award compensatory damages for speculative injuries, but only for those injuries which the Plaintiffs and/or the Decedent, Susan White, have actually suffered or that the Plaintiffs are reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the

Plaintiffs prove the amount of their losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

You should consider the following elements of damage for each of the individuals listed to the extent you find them proved by a "preponderance of the evidence".

SPECIAL INTERROGATORIES (DAMAGES)

I.

As to the claims of compensatory damages by the Plaintiff, JASON AGUILLARD, as the surviving son of the Deceased, Susan White, consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element and do not include interest on any amount of damages you find. Answer in dollars and cents, if any:

Element a: Pecuniary loss. $500,000.00

"Pecuniary loss" means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, that **Jason Aguillard** would, in reasonable probability, have received from Susan White had she lived.

Element b: Loss of companionship and society.

$500,000.00

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that **Jason Aguillard** would, in reasonable probability, have received from Susan White had she lived.

Element c: Mental Anguish $500,000.00

"Mental anguish" means the emotional pain, torment, and suffering experienced by **Jason Aguillard** because of the death of Susan White.

In determining damages for elements b and c, you may consider the relationship between **Jason Aguillard** and Susan White, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements b and c, like the other elements of damages, are separate, and, in awarding damages for one element, you should not include damages for the other.

II.

As to the claims of compensatory damages by the Plaintiff, O.L. HARRISON, as the surviving mother of the Deceased, Susan White, consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element and do not include interest on any amount of damages you found. Answer in dollars and cents, if any.

Element a: Pecuniary loss. $500,000.00

"Pecuniary loss" means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, that **O.L. Harrison** would, in reasonable probability, have received from Susan White had she lived.

Element b: Loss of companionship and society.

$150,000.00

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that **O.L. Harrison** would, in reasonable probability, have received from Susan White had she lived.

Element c: Mental Anguish $250,000.00

"Mental anguish" means the emotional pain, torment, and suffering experienced by **O.L. Harrison** because of the death of Susan White.

In determining damages for elements b and c, you may consider the relationship between **O.L. Harrison** and Susan White, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements b and c, like the other elements of damages, are separate, and, in awarding damages for one element, you should not include damages for the other.

III.

As to the claims of compensatory damages by the Plaintiff, WILLIAM HARRISON, as the surviving father of the Deceased, Susan White, consider the elements of

damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element and do not include interest on any amount of damages you find. Answer in dollars and cents, if any.

Element a: Pecuniary loss $500,000.00

"Pecuniary loss" means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, that **William Harrison** would, in reasonable probability, have received from Susan White had she lived.

Element b: Loss of companionship and society. $150,000.00

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that **William Harrison** would, in reasonable probability, have received from Susan White had she lived.

Element c: Mental Anguish $250,000.00

"Mental anguish" means the emotional pain, torment, and suffering experienced by **William Harrison** because of the death of Susan White.

In determining damages for elements b and c, you may consider the relationship between **William Harrison** and Susan White, their living arrangements, any extended absences from one another, the harmony of their family relations, and the common interests and activities. You are reminded that elements b and c, like the other elements of damages, are separate, and, in

awarding damages for one element, you should not include damages for the other.

IV.

As to claims of compensatory damages by the Plaintiff, GLORIA HAMILTON, as the surviving sister of the Deceased, Susan White, consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element and do not include interest on any amount of damages you find. Answer in dollars and cents, if any.

Element a: Pecuniary loss. $ –0–

"Pecuniary loss" means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, that **Gloria Hamilton** would, in reasonable probability, have received from Susan White had she lived.

Element b: Loss of companionship and society

$100,000.00

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that **Gloria Hamilton** would, in reasonable probability, have received from Susan White had she lived.

Element c: Mental Anguish $100,000.00

"Mental anguish" means the emotional pain, torment, and suffering experienced by **Gloria Hamilton** because of the death of Susan White.

In determining damages for elements b and c, you may consider the relationship between Gloria Hamilton and Susan White, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements b and c, like the other elements of damages, are separate, and, in awarding damages for one element, you should not include damages for the other.

V.

As to the claims of compensatory damages by the Plaintiff, SANDRA HARRISON, as the surviving sister of the Deceased, Susan White, consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element and do not include interest on any amount of damages you find. Answer in dollars and cents, if any.

Element a: Pecuniary loss. $ –0–

"Pecuniary loss" means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, that **Sandra Harrison** would, in reasonable probability, have received from Susan White had she lived.

Element b: Loss of companionship and society.
$100,000.00

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that **Sandra Harrison** would,

in reasonable probability, have received from Susan White had she lived.

Element c: Mental Anguish $200,000.00

"Mental anguish" means the emotional pain, torment, and suffering experienced by **Sandra Harrison** because of the death of Susan White.

In determining damages for elements b and c, you may consider the relationship between **Sandra Harrison** and Susan White, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities. You are reminded that elements b and c, like the other elements of damages, are separate, and, in awarding damages for one element, you should not include damages for the other.

VI.

As to the claims of compensatory damages by SANDRA HARRISON ON BEHALF OF THE ESTATE OF SUSAN WHITE, consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element and do not include interest on any amount of damages you find. Answer in dollars and cents, if any.

Element a: physical pain and mental anguish $500,000.00

"Physical pain and mental anguish" means the conscious physical pain and emotional pain, torment, and

suffering experienced by Susan White before her death as a result of the occurrence in question.

Element b: funeral and burial expenses $ 20,000.00

"Funeral and burial expenses" means the reasonable amount of expenses for funeral and burial for Susan White reasonably suitable for her station in life.

PUNITIVE DAMAGES

If you find that the Defendants are liable for the Plaintiffs' injuries, you must award the Plaintiffs' compensatory damages that they have proven. You also may award punitive damages.

If you determine that deputy McGowen's conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion to award those damages. In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a Defendant for shocking conduct, and to deter the Defendant and others from engaging in similar conduct in the future. The law does not require you to award punitive damages, however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. However, the amount can be as large as you believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of deputy McGowen in fixing the amount of punitive damages.

INTERROGATORY NO. 1

What sum of money, if any, should be assessed against Defendant Joseph K. McGowen and awarded to the Plaintiffs as punitive damages for the death of Susan White?

> "Punitive damages" means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.

Factors to consider in awarding punitive damages, if any, are:

a. The nature of the wrong.

b. The character of the conduct involved.

c. The degree of culpability of the wrongdoer.

d. The situation and sensibilities of the parties concerned.

e. The extent to which such conduct offends a public sense of justice and propriety.

Answer in dollars and cents, if any, as to the following:

a.	Jason Aguillard	$500,000.00
b.	O.L. Harrison	$100,000.00
c.	William Harrison	$100,000.00
d.	Gloria Hamilton	$100,000.00
e.	Sandra Harrison, Individually and on behalf of the Estate of Susan Harrison White, Deceased	$200,000.00

We, the jury having reached unanimous agreement as to each of the answers recorded herein return these answers as our verdict.

Signed this 25 day of September, 1996.

/s/ Illegible
FOREPERSON

DEPARTMENT MANUAL:
POLICY AND ETHICS

Harris County Sheriff's Department

Harris County, Texas

/s/ Johnny Klevenhagen
JOHNNY KLEVENHAGEN,
SHERIFF
HARRIS COUNTY

* * *

CHAPTER III
Department Policy, Rules and Ethics

General Policies

11.0 The following general policies shall apply throughout the Department.

11.1 Suggestions for Good of Department. An employee desiring to make a suggestion for the good of the Department should submit a detailed statement of same, in writing, through channels addressed to his commanding supervisor.

11.2 Policy in Public Relations. It is the Department policy that employees shall strive to gain public support and win friendly citizen cooperation for the Department programs and procedures in order to facilitate the accomplishment of the Department's objectives. The attitude of each employee shall be one of service and courtesy, but not servility or softness. In nonrestrictive situations, the employee should be pleasant and personal, and on occasions calling for regulation and control, the

attitude shall be firm and impersonal, but avoiding even an appearance of rudeness.

11.3 Policy in Juvenile Matters.

a. It shall be the Department policy in cases involving the delinquency of juvenile offenders to view the matter with a preventive attitude. All feasible steps shall be taken with a view to properly adjusting or referring such cases to allied social agencies before resorting to court action.

b. Juveniles alleged to be delinquent shall be referred to as subjects, or in dependency matters as victims. It is of utmost importance that Deputy attitude, demeanor and speech toward juveniles be civil and respectful, but at the same time firm. It is the responsibility of every employee of the Department to properly report any matter coming to his attention in which a juvenile is delinquent or the victim of an offense or neglect.

11.4 Policy Regarding Vice.

a. It is the Department policy that Deputies shall make arrests in all instances wherein the Deputy feels reasonably certain that the suspect is guilty of the violation of any law or ordinance pertaining to vice and there is sufficient evidence to warrant the arrest. If any Deputy personally observes such violation, he should proceed as in any other crime committed in his presence.

b. However, where he has information or suspects that vice violations are occurring behind closed doors, he is generally in no position to secure the type of evidence necessary to convict. In

such cases, he shall gather all information possible without making himself obvious to the suspects and make a full report on the matter to his immediate supervisor. If it appears that the matter requires immediate attention, he should contact his supervisor immediately for instructions.

c. Where information is received from a complainant, victim, or informant which requires immediate attention, an oral report to his immediate supervisor shall be made immediately, followed by a written report.

d. It shall be the responsibility and duty of every employee who is given information concerning vice violations to communicate same to his proper supervisor.

11.5 Policy Governing the Recruitment of Employees. Because the functions of the Office of Sheriff involve the protection of life and property and the enforcement of the law and because, fundamentally, all functions of the Department are in the interests of public welfare and safety, and because law enforcement officials, by law, are endowed with authority far beyond that possessed by the ordinary civilian, the Department has an indispensable obligation to the public it serves to insure that individuals with criminal records, questionable loyalty or morals, and unstable personalities are not employed. Therefore, an investigation shall be conducted into the character and background of each candidate for employment with this Department for the purpose of establishing the suitability of each such candidate for such employment. Candidates with criminal records, questionable loyalty or morals, and unstable personalities shall be rejected

where the facts as established by an investigation warrant such action.

11.6 Policy Concerning Use of Firearms in Police Actions.

a. Legal Limitations. Deputies may use firearms only under certain restricted justifiable circumstances. Penal Code Sections 9.51 and 9.52 delineate the Texas law of justifiable homicide.

The law specifies that a Deputy must not discharge his firearm except in limited situations. No Deputy has the right to extend this power, but must decide his action in light of the circumstances confronting him within the limitations of his authority.

b. Self Defense. A Deputy is entitled to use deadly force when it is necessary to save himself, a citizen, a brother Deputy, or a prisoner from death or grave bodily harm. He is not permitted to use deadly force to protect himself from assaults which are not likely to have serious results.

c. Misdemeanants. A Deputy may not use deadly force to effect the arrest or prevent the escape of a person who has committed a misdemeanor. This restriction does not infringe upon a Deputy's right of self defense should he be attacked.

* * *

McGowen, Joseph K., Police Office
Employ #87901

Captain Young:

Please ensure that this supervisory critique form is completed and forwarded through your chain of command, to Chief Brown.

Thanks,
D. L. McCulley, Sergeant
Employee Information SEction
Personnel Division

SUPERVISORY CRITIQUE OF SEPARATED EMPLOYEE

The purpose of this questionnaire is to obtain information regarding your opinions and attitudes of an employee who was working directly under your supervision. Please be totally honest in providing answers to the questions enclosed within this form. Your responses will be compiled with other information which will be used to determine which departmental programs, practices, or policies are in need of improvement.

Your answers will be kept confidential as our intent is to first, obtain information and second, to combine it with responses from other supervisors.

Thank you very much for your cooperation in completing this questionnaire. Upon completion, please forward the form to the Personnel Division.

HOUSTON POLICE DEPARTMENT
– CLASSIFIED INFORMATION

NAME OF EMPLOYEE JOSEPH K. MCGOWEN

EMPLOYEE NUMBER 87901

RANK POLICE OFFICER

DIVISION ASSIGNMENT COMMAND STATION WESTSIDE

TIME SPENT IN DIVISION: 1.5 years

TIME SPENT AS EMPLOYEE'S SUPERVISOR: 6 months direct/1.5 yrs

LAST PERFORMANCE RATING: 26

WORK EXPERIENCE

1. **Please describe what the employee's job was and the quality of his/her performance (note significant strengths/weekness):**

   Employee worked as a Patrol Officer. I considered Employees performance to be poor with a lack of maturity and a general bad attitude towards the department and its management team. During the time I supervised the Employee I did not observe any significant strengths worth noting.

2. **Please describe the types of working relationships the employee had with other departmental personnel (all ranks):**

   The employee had a poor relationship with supervisors brought about about by his lack of orientation to authority. Among his peers he was generally tolerated by some and not respected by others.

3. **Do you recall experiencing any significant supervisory problems with the employee; if yes, please explain:**

Yes. The employee had a record of continuely requesting special favors 2 weeks before the employees separation the employee was denied a special request, during the remainder of the shift this supervisor had his radio transmissions interrupted by another radio. This supervisor then listened to the tape of that night and was able to recognize this employees voice on the tape. When confronted with the evidence the employ then threatened to retaliate by making bogus IAD complaints against this supervisor which would become a permanent part of the supervisors record. Another incident occurred in which a citizen called for a supervisor to come to the scene of an accident, this supervisor found that the citizen had a valid complaint and that employee was not being impartial. When employee was asked why he stated because the lady had a big mouth.

4. **How long were you aware of the employee's desire to leave the department?**

The employee talked of leaving often for as long as I knew him 1.5 years.

5. **Once you have learned the employee had decided to leave, did you observe any changes in his/her performance; if so, explain:**

The employees general negative attitude intensified and his actions turned from disrespectful to mutimous.

I overheard the employee talking to other employees stating "he was illegible run as few calls as possible and take as long on a call as he could illegible with.

6. **Why do you feel the employee decided to leave the department?**

   The employee was supposedly from a family situation that left him financially secure for life. The employee apparently enjoyed the excitement of Police work but was an arrogant malingering malcontent when placed under any type of supervision. I believe the employee thought he would be happier in a situation in which he was not supervised

7. **Would you recommend the employee be rehired by the department at a later date, why?**

   No. The employees maturation level and attitudes towards the department were not compatible with acceptable job performance

8. **If the employee was allowed to return to work, would you like to supervise the employee again, if not, why?**

   No. He required too much time and attention, taking me away from other more important duties, also he was a disruptive influence among peers. Often giving advise where not requested or warranted

9. **What type of Divisional assignment do you feel the employee is best suited for?**

   One in which he would work alone with few responsibilities and no contact with the public

10. **Please record any other comments you may wish to share about this employee:**

    The employee had a record of not carrying out his duty to the best of his abilities while encouraging others to follow his example. This being a distraction to the overall mission and structure of the department.

An example of this was when the officer was told to write a ticket at the scene of an accident, He stated he would not, that Captain Young told him he did not have to write tickets anymore and that he had not carried a ticket book for over a year and that he did not think any officer should write tickets.

Additionally the employee had a form of crusador arrogance in which he didn't care about what was proper or the correct way to handle a situation but if he thought he knew a better way he would do it his way. An example was he found a juvenile who told the employee he had been abandoned. The employee told the juvenile he could come live with him. After this supervisor looked into this case and found the officer to be out of line threatening the Mother and case worker with arrest. After I advised the employee to leave the case to the C.P.S. worker he continued in the case off duty and only quit when the Mother hired a lawyer to get a restraining order against employee.

NAME OF SUPERVISOR: Sgt. C.J. Grysen

DATE COMPLETED: 01/12/89

PERSONNEL REVIEWER:

CITY OF HOUSTON

INTER OFFICE CORRESPONDENCE

TO: J. Gallemore, Captain
Recruiting Division

FROM: W.A. Young, Captain
Comman Station Operations

DATE: September 8, 1989

SUBJECT: Request for Reinstatement
Joseph K. McGowen

I have researched the records regarding the former Houston Police Officer Joseph K. McGowen, and recommend that he not be considered for reemployment. His previous supervisor considered his performance to be poor and he is generally described as immature with a negative attitude.

If I can be of any further assistance, please feel free to call me at 584-4711.

/s/ W.A. Young
W.A. Young, Captain
Command Station Operations

CITY OF HOUSTON

INTER OFFICE CORRESPONDENCE

TO: Lee P. Brown
Chief of Police

VIA: E. G. Huhn, Lieutenant
Employment Services Division

J. Gallemore, Captain
Employment Services Division

Dr. J. Seitzinger, Director
Career Development Bureau

F. E. Yorek, Assistant Chief
Professional Standards Command

FROM: Investigator B-1234
Employment Services

DATE: October 3, 1989

SUBJECT: Request for Reinstatement
JOSEPH KENT McGOWEN

On August 14, 1989, JOSEPH KENT McGOWEN, a former Houston police Officer, submitted a request for reinstatement to this Department. He entered the Police Academy on October 14, 1985, and resigned on January 9, 1989, as a Police Officer assigned to the Field Operations Command, West Patrol Bureau, Command Station Operations.

A partial background investigation conducted into Mr. MoGowen's request for reinstatement revealed the following information:

A review of Mr. McGowen's personnel file indicated Mr. McGowen was never formally disciplined for any Department violations; however, records in the Internal Affairs

Division showed that Mr. McGowen received disciplinary action in two sustained cases, Control #88-1338 and #88-1503.

The investigation conducted by the Internal Affairs Division in Control #88-1338 centered around the actions of Officer C. Phillips and former Officer McGowen between July 3, 1988, and July 14, 1988. Mr. McGowen and Officer Phillips had been involved in a personal relationship for some time. When Mr. McGowen attempted to break off this relationship, Officer Phillips became very upset and numerous messages were communicated between the two of them over the Mobile Data Terminals in the police unit. These incidents continued to occur until 5:00 a.m. on July 13, 1989, when Mr. McGowen called for a supervisor to remove Officer Phillips from his apartment. The investigation conducted by the Internal Affairs Division resulted in Officer Phillips being cited for numerous violations of Department policy, and Mr. McGowen being cited for improper use of City equipment since he used a Mobile Data Terminal to communicate personal messages. As a result of this finding, Mr. McGowen was issued a written reprimand on December 14, 1988.

Control #88-1503 was a Division investigation conducted as a result of a complaint filed by U.D. Bellot. This investigation centered around Mr. McGowen's actions on August 30, 1988, at the scene of an accident at Richmond Avenue and Hillcroft. This investigation revealed Mr. McGowen refused to provide information on one driver to the other operator. Based on this finding Mr. McGowen was cited for violating General order #600-9 regarding accident investigations, and it was recommended that he receive counseling in this incident. It was noted in the file

that Mr. McGowen resigned prior to this finding, and that should he return to the Department the disciplinary action was to be served at that time.

A review of Mr. McGowen's exit interview was also conducted. Although Mr. McGowen indicated he was resigning to attend college, he did express some unhappiness with the Department. He cited the pay as his main reason for leaving the Department, but also indicated that he felt the career development opportunities within the Department were bad, and that a change in leadership was needed.

Mr. McGowen was also given an unfavorable rating on his "Supervisory Critique of Separated Employee." This critique, completed by Sergeant C. J. Gryson, shows Mr. McGowen was assigned to Command Station Operations for a year and a half. During that time Sergeant Gryson directly supervised Mr. McGowen for six months, and indirectly for the remainder of the time. Sergeant Gryson indicated Mr. McGowen was basically arrogant, immature, and displayed a poor attitude toward the Department and its managers. This attitude became even worse once he decided to resign, and he was overheard on occasion telling other officers that he intended to do as little as possible. Sergeant Gryson also indicated Mr. McGowen was a supervisory problem and cited several examples. In one case Sergeant Gryson was called to an accident scene by a citizen, and he found that Mr. McGowen was not being impartial in his handling of the scene. When Sergeant Gryson asked Mr. McGowen to explain his actions, he stated his actions were due to the lady having a "big mouth." At the scene of another accident, Mr. McGowen was instructed to issue a citation;

however, he initially declined to do this, stating that Captain Young had told him he did not have to write tickets. In another instance, Mr. McGowen became overly involved in an abandoned juvenile case to the point that he had to be instructed to let Child Protective Services handle the matter; however, he continued to be involved in an off duty capacity until the mother of the juvenile threatened to obtain a restraining order. Sergeant Gryson indicated Mr. McGowen also had problems in getting along with his co-workers, and it was his recommendation that Mr. McGowen not be rehired.

Captain W. A. Young was Mr. McGowen's Commanding Officer during the time he was assigned to Command Station Operations. In a letter, which is in file, Captain Young recommended that Mr. McGowen not be reinstated due to his immaturity and negative attitude.

In addition the following supervisors and officers were contacted in regard to Mr. McGowen's request for reinstatement:

Lieutenant M. H. Luiz, who was assigned to Command Station Operations at the time of Mr. McGowen's resignation, originally wrote a letter recommending Mr. McGowen be reinstated, because he did not feel he had the documentation needed to give an unfavorable recommendation. However, on further review, Lieutenant Luiz stated he no longer stands by his original recommendation. He indicated that Mr. McGowen was a supervisory problem and a chronic complainer, who seemed always unhappy with the area he was assigned to patrol or the vehicle he was assigned. As a result, Lieutenant Luiz

stated it was his recommendation that Mr. McGowen not be reinstated to the Houston Police Department.

Sergeant C. J. Gryson, Command Station Operations, was also interviewed. He stated he recommended Mr. McGowen not be reinstated in the supervisory critique he completed at the time of his resignation, nothing has occurred since to change his position.

Sergeant R. D. Hayes, Command Station Operations, also supervised Mr. McGowen during the time he was assigned there. He gave Mr. McGowen an unfavorable recommendation, stating he was not dependable. He indicated Mr. McGowen always wanted to ride "where the women were", and frequently complained if he was not happy about the area he was assigned.

Officer Teresa Barr, Command Station Operations, also gave Mr. McGowen an unfavorable recommendation, stating he was immature and conceited. She further indicated that should he be reinstated, she would not want to ride with him under any circumstances.

Officer Mark Bearden, Command Station Operations, could neither give Mr. McGowen a recommendation for or against reinstatement. He indicated he personally had no objections to his returning to the Department. However, if Mr. McGowen was reinstated, he indicated he would not want to ride with Mr. McGowen, because he was too aggressive.

This information was reviewed by Lieutenant E. G. Huhn, Employment Services Division, and based upon this information it is recommended that Mr. McGowen's request for reinstatement be denied.

On November 15, 1989, the appeal of Mr. Joseph Kent McGowen, reached the level of the Division Commander of the Employment Services Division. In that capacity, I met with Mr. McGowen at 1:00 p.m. on that date.

During the course of that discussion, Mr. McGowen stated that many, if not all, of the supervisors and co-workers previously contacted had changed their opinion and supported his being reinstated. He also presented other names of supervisors and co-workers who supported him in his effort to be reinstated. Additionally, Mr. McGowen presented numerous letters of recommendations from friends, relatives and associates.

To ensure a decision in the best interest of this organization and the individual involved, I directed that Mr. McGowen's supervisors again be contacted to determine any additional pertinent information. Sergeant John Leggio conducted that part of the investigation. His letter is attached. It only confirms the original information learned from previously contacted supervisors. A supervisor not previously contacted, only strengthened the initial recommendation.

Mr. McGowen presented an impressive array of documents from friends, relatives and associates testifying to his good character and worth. His good character and worth, however, are not at issue. What is at issue is McGowen's suitability to be a police officer for this Department. A significant majority of Mr. McGowen's supervisors and co-workers have gone on record saying he is not. Based on all I know, I recommend the initial

decision stand. I still believe McGowen's request for reinstatement be denied.

/s/ J. Gallemore
J. Gallemore, Captain
Employment Services Division

JG:chv

APPEALS BOARD REVIEW

JOSEPH K. McGOWEN

CLASS 137

ON OCTOBER 3, 1989, POLICE APPLICANT JOSEPH K. McGOWEN, WM/24, WAS REJECTED BY INVESTIGATOR B-1234 FOR UNFAVORABLE EMPLOYMENT BACKGROUND.

ON NOVEMBER 2, 1989, MR. McGOWEN WAS GIVEN A CHANCE TO EXPLAIN TO THIS REVIEW BOARD AS TO WHY HIS APPLICATION FOR REINSTATEMENT INTO THE HOUSTON POLICE DEPARTMENT SHOULD BE OVERTURNED AND ALLOW HIM TO COMPLETE THE APPLICATION PROCESS.

SERGEANT E.J. SAENZ, EXPLAINED TO MR. McGOWEN THAT MANY OF HIS PREVIOUS SUPERVISORS WITH THE HOUSTON POLICE DEPARTMENT HAD GIVEN HIM AN UNFAVORABLE RECOMMENDATION, CITING HIS ARROGANT, IMMATURE ATTITUDE.

IN RESPONSE, THE APPLICANT STATED THAT HE RECENTLY CALLED SERGEANT C.J. GRYSON AND APOLOGIZED TO HIM FOR ANY PAST CONFLICTS. THE APPLICANT ALSO STATED THAT HE CONTACTED SERGEANT HAYS AND SERGEANT HAYS JOKINGLY TOLD INVESTIGATOR B-1234 THAT THE APPLICANT ALWAYS COMPLAINED ABOUT HIS SHOP. THE APPLICANT FURTHER STATED THAT HE NEVER HAD ANY VERBAL CONFLICTS WITH HIS SUPERVISORS. THE APPLICANT ALSO STATED THAT HIS IMMEDIATE SUPERVISOR WAS SERGEANT LARRY

LAKIND AND THAT SERGEANT LAKIND WAS NEVER CONTACTED BY INVESTIGATOR B-1234. THE APPLICANT FURTHER STATED THAT HE HAD NEVER RECEIVED ANY DISCIPLINARY ACTION FROM THE INTERNAL AFFAIRS DIVISION, ALTHOUGH THE BACKGROUND INVESTIGATION REVEALS TWO ACTIONS LISTED IN THE TERMINATION REPORT.

OFFICER C.E. HUNT, EMPLOYEE #87895, APPEARED BEFORE THE BOARD TO TESTIFY ON THE APPLICANTS BEHALF. OFFICER HUNT STATED THAT HE ATTENDED THE HOUSTON POLICE ACADEMY WITH THE APPLICANT. HE FURTHER STATED THAT HE WORKED AT THE WESTSIDE COMMAND STATION WITH THE APPLICANT. OFFICER HUNT STATED THAT THE APPLICANT WAS VERY KNOWLEDGEABLE ABOUT THE LAW AND DID AN EXCELLENT JOB. HE FURTHER STATED THAT THE APPLICANT WAS MORE AGGRESSIVE THAN HIMSELF BUT THAT HE DIDN'T WANT TO IMPLY THAT THE APPLICANT WAS TOO AGGRESSIVE.

THE APPEALS BOARD UNANIMOUSLY AGREED TO UPHOLD THE REJECTION AND REFER THE APPEAL TO LIEUTENANT HUHN FOR FURTHER REVIEW.

On November 14, 1989, at 9:00 A.M., Mr. McGowen appealed the decision of the Employment Services Division, Recruiting Unit Appeals Board. I, Lieutenant E. G. Huhn, as the next level in the appeals process, afforded Mr. McGowen an opportunity to discuss his application

and to offer reasons why this application for reinstatement should not be rejected.

Mr. McGowen stated that he did not understand why he received negative recommendations from his former supervisors and co-workers, since he believed he had been an exemplary officer and had performed his job well. He stated he had requested and received favorable letters of recommendation from family, friends, business associates, and Houston Police Department personnel who were familiar with his personal habits and job performance. Copies of these letters are in file. He further stated that he had apologized to Sergeant Gryson, whom he believed to have given him a unfavorable recommendation due to a misunderstanding. Mr. McGowen denied receiving any disciplinary action as a result of divisional or Internal Affairs Division investigation. He stated the incident with Officer Phillips was strictly her fault and he believed she had mental problems.

Based on information presented by Mr. McGowen and on information contained in the original investigative report, I have upheld the decision of the appeals Board to deny Mr. McGowen's request for reinstatement. Negative information in file was received from all levels of supervision and from co-workers associated with Mr. McGowen during his tenure as police officer with this Department.

/s/ E.G. Huhn, Lt.

On November 20, 1989, I contacted the below listed supervisors pertaining to Mr. Joseph Kent McGowen's application for reinstatement.

The following is a compilation of the comments and recommendations of Mr. McGowen's immediate and most recent supervisors prior to his resignation.

Sergeant C. J. Grysen:

He stated that he still abides by the statements about Mr. McGowen contained in the supervisory Critique of Separated Employee which he completed at the time of Mr. McGowen's resignation. Sergeant Grysen further stated Mr. McGowen had contacted him to apologize and to ask for a favorable recommendation, upon learning of his rejection for reinstatement. Sergeant Grysen acknowledged he did not understand Mr. McGowen's compulsion to apologize; nonetheless, Sergeant Grysen still stands by his initial recommendation, as Mr. McGowen's last full time immediate supervisor, that Mr. McGowen not be considered for reinstatement.

Lieutenant Michael Luiz:

He reaffirmed his original recommendation not to reinstate Mr. McGowen. Lieutenant Luiz stated that Mr. McGowen was a constant complainer, who routinely threatened to file grievances for anything that did not please him. He consistently complained and argued about the beat he was assigned or the vehicle he had to drive. On one occasion, after being advised not to, Mr. McGowen used his police radio to contact Captain Young complaining about a vehicle he was assigned to drive.

Lieutenant Luiz described Mr. McGowen as a malcontent and supervisory problem.

Sergeant Russ Hays:

He described Mr. McGowen as an employee who was always unhappy and never satisfied. He stated that Mr. McGowen served as a source of agitation to all who worked around him due to his constant nagging. Sergeant Hays summed up his appraisal of Mr. McGowen by stating he would not want to supervise him again.

Sergeant Larry Lakind:

He stated he supervised Mr. McGowen for two days a week for six months, when Mr. McGowen's regular supervisor was off. Sergeant Lakind gave Mr. McGowen a favorable recommendation and confirmed Mr. McGowen had contacted him requesting a favorable recommendation. It should be noted that Sergeant Lakind was not contacted originally by Investigator #1234, because Sergeant Lakind was not listed as the immediate supervisor who supervised Mr. McGowen on a daily basis.

After reviewing Mr. McGowen's personnel folder, conducting personal interviews, and speaking to the aforementioned supervisors, I concur with the initial recommendation that Mr. Joseph Kent McGowen not be reinstated into the Houston Police Department.

/s/ J. A. Leggio
J. A. Leggio, Sergeant
Employment Services Division

JAL:svk

HARRIS COUNTY PCT #4 CONSTABLES DEPT
INTERNAL INVESTIGATION REPORT

Investigating Deputy:
Cpl. R.C. Schweitzer
Unit #: 65

Date of Report:
March 26, 1990

Investigative Summary:

03/08/90 At approx 1700 hours I spoke with Cheryl Cox, the manager of the Lakewood Apartments, 11000 Gatesden Dr., where Deputy McGowen lives.

Cheryl Hoover Cox W/F DOB: 06/01/60 tdl#: 02498494
4207 Tylergate
Spring, Texas 77373
Home: 350-5827
Office: 370-2886

Ms. Cox said Joseph Kent McGowen lives in Apartment #1001. He used to work security up until Jan, 90. when he was a police officer for Tomball PD. She told me he hasn't worked security for them since he went to work for Pct #4 Constables Dept because of policy restrictions of the Constable's Dept.

I asked Ms. Cox to show me their account ledger card for Deputy McGowens rent payments. She said they did not have one for him. He received credit for rent payment in February because he referred several new tenants. Deputy McGowens March payment has not been paid yet.

I inquired on the procedure of handling "after hour" complaints from residents. Ms. Cox

said ABS Answering Service (550-1102) handles all calls after hours.

Ms. Cox told me that Deputy McGowen told her he was involved in an incident early Sunday morning at approx 0300 hours. He told her that he pulled his gun on someone who had been doing donuts in the parking lot and then drove straight at him when he tried to confront the suspects on foot. He also told her he tried to get help from the maintenance personnel who live on the property but could not locate them.

Ms. Cox said she did not receive any other complaints or calls regarding this incident. She said Deputy McGowen did a good job when he worked security for them and she appreciated him responding to this disturbance.

03/08/90 At approx 1800 hours I spoke with Glen Rogers, a maintenance worker who lives on the apartment complex:

Rogers, Glenn Wayne W/M DOB: 05/19/54
TDL#: 00126047
11000 Gatesden Apt#: 605
Tomball, Tx 77375
Home: 370-8275
Work: 370-2886

Mr. Rogers said he heard of this incident from some residents at the complex. The disturbance involved teenagers and he heard that their parents had called the office trying to identify if Deputy McGowen worked for the apartment complex. I tried to identify which residents he spoke with but Mr Rogers was

vague and appeared not to want to discuss it claiming he did not know any details.

03/08/90 At approx 1830 hours I went to apartment #1305 to speak with the other on-site maintenance man, Carl Shirley. I got no response at his apartment.

03/08/90 I telephoned ABS Answering Service regarding their procedures for handling after hours calls for the Lakewood Apartments. Cheryl Cheerie [told] me she could not release any information without her supervisors approval. She would talk with her and call me back. Approx ½ hour later after not hearing from her I called again. Ms. Cheerie told me she called Lakewood Apts and spoke with Ms. Cox. Ms Cox told her it was OK to advise us that any incoming call is referred to the on-call manager. I asked if they keep a record of these call[s] and she said they did. When I asked if they received any complaints on Sunday early morning she told me she couldn't release that information and to call back during working hours and speak with Brenda Campbell or Linda Potts.

3/08/90 At approx 1900 hours I drove to the northeast end of the apartment complex and attempted to locate witnesses to the disturbance. I located a boy named John Julian:

John Trenton Julian W/M 14 Years Old DOB: 11/14/75
11000 Gatesden Apt #:1605
Spring, Texas 77375

John Julian told me on 3/03/90 at approx 0300 hours he was awaken by someone banging on his door. Two girls (one he remembers

as Kelly) were calling for help and wanted to use his phone to call the police. He said they appeared extremely upset and said a security guard pointed a gun at their friend. (See attached statement).

After a few minutes a guy came to apartment. He had a large knot on his forehead. It was red and swelled up. John Julian said he got some ice for the guy and they all waited at his apartment for several hours waiting for the police to arrive. A sheriffs deputy finally arrived about 0430 or 0500 hours.

I asked John Julian if the guy or the girls appeared intoxicated. He said no that they were just scared and mad.

03/08/90 At approx 2015 hours I spoke with Deputy Joseph Kenton McGowen at 6831 Cypresswood Drive Regarding this Complaint. Prior to any questioning I read Deputy McGowen his legal rights. He said he understood each and everyone of those rights and voluntarily waived those rights and would discuss the incident with me. I advised him the interview was going to be electronically recorded by a tape recorder and he had no objections.

Deputy McGowen also made a written statement after the taped interview. See attached statement.

Deputy McGowen said he was involved in an incident with the Complainant Mr Newrones on Sunday Morning at approx 0315 hours. He confronted the complainant because of disorderly conduct of Mr Newrones and his associated. He refutes assaulting him with a weapon and claimed it was a minor incident

that he felt no further action was required on his part. I asked him if he had his gun out. He told me he had it out and by his side when he first confronted Mr Newrones. He stated Mr Newrones drove towards him in his car and he was concerned as to what he might do and for his safety.

Deputy McGowen said he is not working apartment security.

03/14/90 At approx 1530 hours I interviewed the complainant Daniel Anthony Newrones at 6831 Cypresswood Dr. I recorded the interview with his full consent and knowledge. His statements and answers to my questions were basically the same as those in his original written statement on March 5, 1990. He gave me the photographs he took of the injury to his forehead when Deputy McGowen allegedly struck him with his handgun.

3/22/90 At approx 1723 hours I went to 30512 Tomball Pkwy and interviewed Kelley Lynnette Kieselhorst. Kelley was a passenger in the car with the Complainant Daniel Newrones and a witness to the incident.

Kelly Lynnette Kieselhorst W/F DOB:07/12/65
TDL#:10412247
26514 S. Carrol
Home: 356-2608
Work: 351-0414
Davis Hair & Skin Care
30512 Tomball Pkwy

Ms. Kieselhorst said that Deputy McGowen came running at their vehicle with his gun out and then pointed at Daniel Newrones face. He told them they were trespassing and that they

always come on the property squealing their tires and causing a disturbance. Deputy McGowen then struck Daniel Newrones' forehead with the end of the handgun.

Investigator Evaluation
Applicant: Joseph K. McGowen
July 24, 1990

Joseph K. McGowen, is a white male, 25 years of age, in good health, currently residing at Rt 1, Box 68, Hockley, Texas, Joseph lives alone in a house on his parents ranch. Joseph was previously married and is planning on getting back together with his former wife.

Joseph is self employed with the firm Orion Investments, which is located at Rt 1, Box 68, Hockley, Texas. Joseph has been a broker with this firm since May, 1990.

All of Joseph's personal contacts spoke very highly of him and know that he is financially secure. I interviewed two former officers that he worked with at HPD Command Station on Dairy Ashford. I also interviewed former officers with Tomball PD and Harris County Constables Pct 4. I have found nothing that would disqualify him from our department. I went down and viewed his personnel file with HPD. There were many good reports and a very good recommendation for rehire from his Sargent.

I interviewed Joseph on July 7, 1990 and found nothing out of the ordinary. He has plenty of street experience and would be an asset to our department.

Joseph understands the restrictions on a Reserve Deputy and he understands the personal expense and time required of a Reserve Deputy.

Pending any irregular findings during his polygraph examination, I recommend that he be approved as a PC.

Bruce A. Paige
Detective, Personnel Division
Harris County Sheriff's Department

HARRIS COUNTY SHERIFF'S OFFICE

APPLICANTS NAME: JOSEPH KENTON McGOWEN

DOB: 04-03-1965

DATE OF REPORT: SEPTEMBER 6, 1990

POSITION: DEPUTY (RESERVE)

PE-TEST AND POST TEST ADMISSIONS:

Concerning his rejection for re-employment at HPD, applicant stated that the best that he could come up with for a reason was that it was something political and would have nothing to do with his performance while on the job. He advised that he has an appointment with an attorney and will attempt to get HPD to disclose the reason for rejection. He advised that he "resigned" from his position with Tom Ball Police Department due to a "flap" with the then police chief . . . he advise that he resigned one day and the chief resigned the next.

In talking with this applicant, he seems to have all the "right" answers, however, circumstances seem to dictate that additional research in his employment history/background is warranted. He may just be a victim of these circumstances and if this is the case, it should be supported by the additional research.